

# MULTI-PLAINTIFF LITIGATION IN AUSTRALIA: A COMPARATIVE PERSPECTIVE

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## I. INTRODUCTION

Class actions—properly called representative or group proceedings—are a comparatively recent phenomenon in Australia. During the past two or three years, there has been an enormous increase in the number of class actions brought in Australia, even though the first proper class action procedure was introduced in 1992. Indeed, Australia is the most likely place outside North America for a plaintiff to bring a class action suit. Surprisingly, Australia has the highest lawyers per capita ratio in the world.<sup>1</sup> In some key practice areas, levels of litigation in Australia now exceed those in most parts of the United States. For example, only California exceeds Australian figures for medical negligence litigation.<sup>2</sup>

In recent times, class actions have been commenced against a truly diverse range of defendants. Product liability claims have been common. Examples include claims involving Fen-Phen, heart pace-makers, tobacco, aircraft fuel, and a variety of foodstuffs ranging from

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The Clayton Utz product liability group has been at the forefront of the development of Australia's class action and product liability laws. The group has successfully defended class actions involving a diverse range of products including tobacco, Fen-Phen, the Sydney water supply and agricultural pesticides.

1. Australia has 35,000 lawyers out of a total population of 18.8 million people, equating to 537 persons per lawyer; the United States has 480,000 lawyers in a population of 262 million people, or 546 persons per lawyer. See *Brave New World?*, LAWYERS WEEKLY, June 23, 2000, at 18.

2. See Greg J. Reinhardt, Comment, *Compensation and Professional Indemnity in Health Care—The Final Report of the Tito Committee*, 4 TORTS L.J. 173, 173 (1996). California has been reported as the most litigious of U.S. jurisdictions. See Christine McCarthy, *Exemplary and Aggravated Damages in Medical Negligence Litigation*, 6 J.L. & MED. 187, 187 (1998).

oysters to peanut butter.<sup>3</sup> Claims involving many thousands of class members have also been commenced against major public utilities, including the suppliers of Sydney's drinking water and Melbourne's gas.<sup>4</sup> Banks and other financial institutions, government agencies, even Ministers of State have also found themselves as defendants in class actions.<sup>5</sup> More recently, we have seen the early stages of the development of shareholder litigation, something else that has, until now, been virtually unknown in Australia.<sup>6</sup> This explosion of interest in the class action mechanism is partly due to the unusual nature of the Australian rules and the plaintiff-friendly nature of that procedure, particularly as compared with the American rules of civil procedure.

This Article considers the development of class actions in Australia, and critically analyzes the class action procedure as it currently stands in Australia. By way of background, Section II provides an overview of the Australian legal system. Section III briefly traces the history of the Australian class action procedure, and reviews in detail the current procedure used in federal and state courts. Section IV then presents a practical view, analyzing how courts have applied and interpreted the procedure on a case-by-case basis. Finally, Section V draws on the Australian experience to suggest which features of the class action system should be maintained, which should be rejected, and why.

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3. See, e.g., *Philip Morris (Austl.) Ltd. v. Nixon* (2002) 170 A.L.R. 487 (Austl.) (tobacco); *Schutt Flying Academy (Austl.) Pty. Ltd. v. Mobil Oil Austl. Ltd.* (2000) V.S.C.A. 103 (Austl.) (aircraft fuel); *Graham Barclay Oysters Pty. Ltd. v. Ryan* (2000) A.T.P.R. (Digest) ¶46-207 (Austl.) (oysters); see also *Butler v. Kraft Foods Ltd.* (regarding a peanut butter class action which settled, Federal Court of Australia). The heart pacemaker class action was commenced in the Federal Court of Australia in June 2000 and the Fen-Phen class action was discontinued as a representative proceeding in that Court in late 2000.

4. The class action involving the supply of Melbourne's gas is still progressing through the interlocutory stages of litigation. The action was recently transferred from the Federal Court of Australia to the Supreme Court of Victoria. See *Johnson Tiles Pty. Ltd. v. Esso Australia Ltd. & Anor* (2001) F.C.A. 421 (Austl.). One class action against Sydney Water was settled, while the other was abandoned by the plaintiffs when the defendants established that nobody was actually injured.

5. See, e.g., *Zhang v. Minister for Immigration, Local Gov't and Ethnic Affairs* (1993) 45 F.C.R. 384 (Austl.) (involving a State Minister); *Marks v. GIO Australia Holdings Ltd.* (1998) 196 C.L.R. 494 (Austl.) (financial institution).

6. See *King v. GIO Australia Holdings Ltd.* (2000) F.C.A. 1649 (Austl.) (still being litigated before the Federal Court of Australia).

## II. OVERVIEW OF THE AUSTRALIAN LEGAL SYSTEM

Australia is a federation comprising six states and two self-governing territories. The Australian Constitution specifies a range of matters that are the responsibility of the federal government. The balance of legal issues remains the responsibility of the various state and territory governments.

Australia's laws and legal system have their foundation in the common law of England. Even today, reference is often made to the decisions of English courts. However, while the judgments of the House of Lords and the English Court of Appeal are of persuasive authority, they are not binding on Australian courts. More recently, in developing Australia's law, its courts have looked to the jurisprudence of other countries, particularly the United States and Canada.

Australia has both a federal court system and a hierarchy of courts in each of the states and territories. In all cases, the ultimate appellate court is the High Court of Australia (High Court). The High Court is also responsible for the determination of constitutional disputes, in the same way as the U.S. Supreme Court.

Actions heard by Australian courts proceed on an adversarial basis. The practice and procedure, including rules of evidence, are similar to those in English courts. Civil proceedings in Australia are generally heard by a judge sitting without a jury. However, it is possible to have a matter heard by judge and jury in most of the state and territory supreme courts. Juries are, as a matter of practice, not available in matters heard in the Federal Court of Australia (Federal Court).<sup>7</sup>

## III. CLASS ACTION PROCEDURE IN AUSTRALIA

### A. Introduction

Until recently, the only Australian court that had a proper class action procedure was the Federal Court. Class actions in the Federal Court are referred to as *representative proceedings*. The procedure regulating representative proceedings in that court came into effect on March 4, 1992, with the insertion of Part IVA into the Court's enabling act.<sup>8</sup>

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7. See discussion *infra* Section IV.A.

8. See Federal Court of Australia Act, 1976 (Cth.). Part IVA was inserted by the Federal Court of Australia Amendment Act, 1991, no. 181, § 3 (Cth.).

Prior to this time, Australian law, like that of the United Kingdom, did not incorporate the concept of a class action. While the various courts' rules had provided for more than one plaintiff to join an action against a defendant or group of defendants, a number of procedural limitations had, for many years, restricted these procedures to the most limited of circumstances. These are outlined briefly below.

Effective January 1, 2000, the Supreme Court of Victoria, a state court, first amended its rules to provide for a class action procedure virtually identical to that of the Federal Court. Class actions in Victoria are known as *group proceedings*.<sup>9</sup> More recently, Victoria's Supreme Court Act 1986 has been amended to insert a new Part 4A entitled "Group Proceeding."<sup>10</sup> Part 4A supersedes the earlier amendment to the rules and is deemed to have come into effect on January 1, 2000<sup>11</sup> and essentially replicates Part IVA of the Federal Court Act—it even adopts the same section numbers (with minor exceptions). However, there are important differences due to the fact that the Supreme Court of Victoria is a state court.<sup>12</sup>

Class actions cannot be brought in any other state courts. However, both the Federal Court and the Supreme Court of Victoria class action procedures have survived recent constitutional challenges.<sup>13</sup> It may be that the other states are awaiting the final outcome of these challenges. It is the Authors' opinion that other states will likely follow Victoria's lead.

In Australia, the class of members is referred to as the *group* and, in the Federal Court, the terms *applicant* and *respondent* are used in-

9. See Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A (Vict.). The amendment was inserted into the Victorian Supreme Court Rules by virtue of the Supreme Court Rules, 1999, ch. 1, am. 11 (Vict.).

10. See Courts and Tribunals Legislation (Miscellaneous Amendments) Act, 2000, § 13 (Vict.).

11. The Courts and Tribunals Legislation (Miscellaneous Amendments) Act, 2000 (Vict.) received Royal Assent on November 28, 2000, but the provision which inserts Part 4A (namely § 13) is deemed to have commenced on January 1, 2000 (per § 2(2)). While this Act does not repeal Rule 18A of the Victorian Supreme Court Rules, a proceeding commenced under Rule 18A.03 prior to the passing of the Courts and Tribunals Legislation Act is taken to have been commenced under the new Part 4A of the Supreme Court Act (§ 33ZK of the Supreme Court Act).

12. See discussion *infra* Section IV.

13. See *Femcare Ltd. v. Bright* (2000) 172 A.L.R. 713 (Austl.) (upholding the validity of the Federal Court representative proceedings procedure); see also *Schutt Flying Academy* (Austl.) Pty. Ltd. v. *Mobil Oil Austl. Ltd.* (2000) V.S.C.A. 103 (Vict.) (upholding the validity of the Supreme Court of Victoria group proceedings procedure). An application for leave to appeal *Femcare* will be heard by the full High Court on a date yet to be advised.

stead of *plaintiff* and *defendant*. For the sake of simplicity, we refer in this Article to the person or persons who commence representative or group proceedings as the *plaintiff* and the respondent or defendant as the *defendant*. Representative or group proceedings shall be referred to as *class actions* and the group as the *class*.

## B. Historical Development of the Procedure

1. *Common Law Representative Actions*. The class action is an extension of the *representative action*, which originated in the English Chancery courts. Prior to the introduction of the class action mechanism in the Federal Court, the procedural rules in that Court, in common with all Australian superior courts of record, provided (and still provide) for representative actions. That is, where numerous persons have the same interest in the proceeding, one or more of them may represent the others.<sup>14</sup>

The same interest requirement has been interpreted narrowly to mean that actions claiming damages cannot be brought in representative form because each claimant's entitlement to damages would have to be independently assessed.<sup>15</sup> This absolute position has been tempered to allow damages to be claimed in a representative action where it is procedurally simpler and more convenient to determine a global figure for the class rather than inquire into each member's individual interest.<sup>16</sup>

The limitations of the representative action were discussed by the Australian Law Reform Commission (A.L.R.C.) in a report that led to the introduction of class actions in the Federal Court.<sup>17</sup> The representative action still survives in Australian jurisdictions.<sup>18</sup> Some

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14. See Federal Court Rules, 1979 (Austl.), Or. 6.13(1) ("Where numerous persons have the same interest in any proceeding the proceeding may be commenced, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them."). For state court rules providing for representative actions, see discussion *infra* Section III.B.1.

15. See *Markt & Co. Ltd. v. Knight Steamship Co. Ltd.*, 2 K.B. 1021 (Eng. C.A. 1910); see also *Barnes & Co. Ltd. v. Sharpe* (1910) 11 C.L.R. 462 (Austl.); *Dillon v. Charter Travel Co. Ltd.* (1988) A.T.P.R. ¶ 40-872 (Austl.).

16. See *EMI Records Ltd. v. Riley*, 2 Eng. Rep. 838 (Eng. C.A. 1981); see also *Carnie v. Esanda Fin. Corp. Ltd.* (1995) 182 C.L.R. 398 (Austl.).

17. See Australian Law Reform Commission, *Grouped Proceedings in the Federal Court*, Report No. 46, ¶¶ 5, 40-45 (1989) [hereinafter A.L.R.C. Report].

18. See Federal Court Rules, 1979 (Austl.), Or. 6.13; Supreme Court Rules Part 8 r. 13(1) (N.S.W.); Supreme Court Rules O. 19 r. 10 (Austl. Cap. Terr.); Supreme Court Rules R. 34.08 (S. Austrl.); General Rules of Procedure in Civil Proceedings O. 18.02 (Vict.); Uniform Civil

of these jurisdictions permit representative actions in which damages are claimed.<sup>19</sup>

2. *First Class Action Procedure in the Supreme Court of Victoria.* In 1986, the Victorian Parliament was the first to attempt to introduce class actions into Australia, by virtue of two statutory provisions.<sup>20</sup> The procedure provided that a representative proceeding may be commenced where three or more persons have the right to the same or substantially the same relief against the same person and where, if separate proceedings were brought, there would be a common question of law or fact.<sup>21</sup> These provisions were recently repealed by the legislation which introduced group proceedings into the Supreme Court Act.<sup>22</sup>

The procedure set down very few requirements. Basically, it established an opt-in system: prior to commencement of the proceeding, all represented persons were required to consent in writing to be represented,<sup>23</sup> or, after commencement, they were required to consent in writing and obtain the leave of the Court.<sup>24</sup> All members of the class had to be named in the originating process.<sup>25</sup> The relevant provisions did not provide any detail as to precisely how the representative proceeding was to be heard, but merely empowered the Supreme Court of Victoria to give directions concerning their administration.<sup>26</sup>

The novel procedure was criticized extensively by the courts and the A.L.R.C.<sup>27</sup> Indeed, in 1992, the Victorian Court of Appeal went as far as saying that the procedure raises “a substantial number of al-

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Procedure Rules Part 1 r. 75 (Queensl.); Rules of the Supreme Court O. 18 r. 12 (W. Austrl.); Supreme Court Rules O. 18 r. 2 (N. Terr.); Rules of the Supreme Court O. 18 r. 9 (Tas.).

19. See Supreme Court Rules R. 34.03(a) (S. Austl.).

20. See Supreme Court Act, 1986, §§ 34, 35 (Vict.). Such a representative proceeding could be brought under these provisions even if the relief to which each person was entitled was or included damages. See Supreme Court Act, 1986, § 35(6)(a) (Vict.).

21. See *id.* § 34(a).

22. See Courts and Tribunals Legislation (Miscellaneous Amendments) Act, 2000, § 14 (Vict.). The repeal was effective from November 28, 2000 (pursuant to § 2(1) of the amending Act).

23. See Supreme Court Act, 1986, § 35(2)(a) (Vict.).

24. See *id.* § 35(4).

25. See *id.* § 35(3).

26. See *id.* § 35(5).

27. See *Zentahope Pty. Ltd. v. Bellotti*, BC 9203164 (1992) (Vict.); see also A.L.R.C. Report, *supra* note 17, at ¶ 45; *A & J Partitions Pty. Ltd. v. Jolly*, BC 9300648 (1993) (Vict.) (Beach, J.). The A.L.R.C.'s criticism was directed at the opt-in nature of the procedure, such that those ignorant of their rights or of the existence of the proceedings would not be included even if they had the same cause of action as those represented in the proceedings.

most insoluble questions of construction,” and that careful consideration should be given to its repeal or else “those for whose benefit one surmises it was enacted are likely to become its victims.”<sup>28</sup> The Court’s principal concern was that the enabling provisions were so brief as to be indeterminate, and that their wording restricted the Court’s ability to use its discretion to overcome the apparent deficiencies.<sup>29</sup> No proceedings ever progressed to final hearing under these provisions. The criticisms led to calls by the legal profession to make the Victorian class action laws more accessible, which, in turn, resulted in the recent introduction of group proceedings into the Supreme Court of Victoria.

3. *Law Reform in the 1990s.* During the early 1990s, the federal government introduced both a strict liability regime for product liability claims<sup>30</sup> and a system of class actions in the Federal Court.<sup>31</sup> It did this with knowledge that these changes would increase the level of product liability litigation and the costs to manufacturers.<sup>32</sup> At the same time, the early stages of competition policy swept away many of the historical rules that had constrained the activities of the legal profession. These included prohibitions on contingency fee agreements<sup>33</sup> and advertising by lawyers.

Initially these reforms appeared to have little effect. However, over the past two or three years, a number of plaintiffs’ lawyers have come to recognize the potential of the changes and have taken steps to exploit them to their considerable advantage. As events unfolded, the introduction of the Federal Court class action procedure was by far the most significant development of the 1990s reforms.<sup>34</sup>

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28. *Zentahope*, BC 9203164 at 12 (Brooking, J.), 17, 24 (Fullagar, J.).

29. *See id.* at 17 (Fullagar, J.), 5, 10, 11, 12 (Brooking, J.), 1, 12 (Tadgell, J.).

30. *See* Trade Practices Act, 1974, Part VA (Austl.).

31. *See* Federal Court of Australia Act, 1976, Part IVA (Austl.).

32. *See* Report by Senate Standing Committee on Legal and Constitutional Affairs, Dec. 1992, 15-16, 26.

33. For many years, all contingency fee agreements were illegal in Australia. The changes introduced during the early 1990s sanctioned contingency fee arrangements, which increase the lawyer’s usual fee by way of a previously agreed percentage or “uplift.” *See, e.g.*, Legal Profession Act, 1987, § 187 (N.S.W.) (capping the maximum uplift in New South Wales at 25%). However, contingency fee agreements that calculate the fee by reference to a percentage of the verdict recovered remain illegal. Consequently, contingency fee arrangements are more restricted in Australia than in the United States.

34. As mentioned earlier, class actions were introduced into the Federal Court by a new Part IVA of the Federal Court of Australia Act, 1976 (Austl.). Two other relevant federal statutory provisions were introduced in 1992. Firstly, § 75AQ was inserted into the Trade Practices Act, empowering the Australian Competition and Consumer Commission (ACCC) to

### C. A “Plaintiff–Friendly” Procedure

Before considering in detail the Australian rules as they relate to class actions, it is useful to understand how the approach of the Australian procedure differs from that of other jurisdictions, particularly the United States. There are three main differences, all of which make the Australian procedure more plaintiff–friendly than its American counterpart.

1. *No Certification Requirements.* First, unlike the U.S. class action procedure, the Australian procedure has no certification requirements. That is, in order to be brought as a class action, there is no threshold requirement that the proceedings be judicially certified as appropriate.<sup>35</sup> In considering whether to certify an action, a U.S. court will carefully consider the issues involved and determine whether the action satisfies the tests imposed by the rules, particularly the requirement for common questions of law or fact.<sup>36</sup> Importantly, the onus is on the class plaintiff to establish that the formal requirements for a class action have been fulfilled, as opposed to ordinary civil litigation where the defendant must establish that any formal requirements have not been fulfilled.<sup>37</sup> In recent years, U.S. courts have displayed an increasing willingness to deny certification of class actions that fail to satisfy the rules.<sup>38</sup>

In contrast, no such requirement is imposed in Australia. The Australian rules provide for the defendant to move the court to terminate the class action in certain limited circumstances.<sup>39</sup> The Federal Court decided not to adopt a certification requirement because the

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bring representative proceedings on behalf of one or more persons who have suffered loss as a result of a contravention of Part VA of the Trade Practices Act, provided that those persons consent. See Trade Practices Act, 1974, §75AQ (Austl.). Secondly, § 87(1B) of the Trade Practices Act (originally inserted in 1986) was amended to empower the ACCC in prosecution proceedings under § 79 or injunction proceedings under § 80, to bring representative proceedings on behalf of persons who have suffered or are likely to suffer loss or damage as a result of a contravention of Part IV or Part V of the TPA. See Trade Practices Act, 1974, §87(1B) (Austl.).

35. In contrast, representative *actions* in South Australia require representative parties, within 28 days after the defendant files an appearance, to apply to the court for an order authorizing the action to be maintained as a representative action. See Supreme Court Rules, R. 34.02(a) (S. Austl.). The requirement for a certification hearing in the United States is set out in the FED. R. CIV. P. 23(c)(1). Cf. *An Act Respecting the Class Action* R.S.Q. 1977, ch. 8, art. 1002 (Que.) (mandating an “authorization hearing”).

36. See *Georgine v. Amchem Prod. Inc.*, 83 F.3d 610, 618 (3d Cir. 1996).

37. See *In re Am. Med. Sys. Inc.* 75 F.3d 1069, 1079 (6th Cir. 1996), and cases cited therein.

38. See Victor E. Schwartz & Mark A. Behrens, *Curbs on Class Action Abuses*, 8 AUSTL. PROD. LIAB. REP. 83 (1997).

39. See discussion *infra* Section III.C.6.



American experience illustrated unwarranted expense and delays in conducting and appealing certification hearings, especially where the defendant had a right to challenge the validity of the procedure at any time.<sup>40</sup> Reversing the burden of convincing the court that a matter should be discontinued as a class action requires an Australian defendant to be more vigilant and proactive than his or her American counterpart.

2. “*Substantial*” *Common Issue of Law or Fact*. Second, the U.S. rules contain *inter alia* three requirements regarding the claims of the class: that there are questions of law or fact common to the class, that the claims of the representative parties are *typical* of the claims of the class,<sup>41</sup> and that the common issues between class members predominate over the individual issues.<sup>42</sup> If these requirements are not satisfied, the matter will not proceed as a class action.<sup>43</sup> Conversely, Australia merely requires (*inter alia*) at least one “substantial common issue of law or fact.”<sup>44</sup> Thus, it does not appear to matter that the common issue or issues are insignificant when compared with the individual issues.

3. *Determination of Individual and Subgroup Issues*. Third, the Australian rules, unlike those in the United States, expressly provide for the determination of what are described as *subgroup* or *individual* issues as part of a class action.<sup>45</sup> This has meant that Australian courts have generally not refused to deal with an action as a class action just because it is more properly described as a mass of individual claims with some common connections. The classic example of this type of action is one involving a drug or medical device. In the United States, courts have been reluctant to allow such actions to proceed as class actions given the unique issues of causation usually raised by individ-

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40. See A.L.R.C. Report, *supra* note 17, at ¶ 146.

41. See, e.g., FED. R. CIV. P. 23(a)(2).

42. See, e.g., FED. R. CIV. P. 23(b)(3).

43. See, e.g., *Georgine v. Amchem Prod. Inc.*, 83 F.3d 610, 618 (3d Cir. 1996) (the latter requirement was not satisfied).

44. Federal Court of Australia Act, 1976, § 33C(1) (Austl.); see also Supreme Court Act, 1986, § 33C(1) (Vict.); discussion *infra* Section IV.B.4; cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.03(1) (Vict.).

45. See Federal Court of Australia Act, 1976, § 33Q-R (Austl.); see also Supreme Court Act, 1986, § 33Q-R (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.15-16 (Vict.).

ual class members.<sup>46</sup> However, some of the persons involved in the development of class actions in the Federal Court expressly intended an action of this nature to proceed as a class action.<sup>47</sup> It is this aspect of the Australian procedure which, it is suggested, should be revised, as discussed in Section V of this Article.

#### D. Procedural Requirements

1. *Initiating a Class Action.* In order to commence a class action in Australia, the following threshold tests must be satisfied:

- At least seven persons must have claims against the same person(s);
- The claims of all these persons must arise out of the same, similar, or related circumstances; and
- The claims of all these persons must give rise to at least one substantial common issue of law or fact.<sup>48</sup>

A class action can only be commenced in the Federal Court if the cause of action arises after commencement of the Act that introduced the procedure, namely March 4, 1992.<sup>49</sup> However, the Supreme Court of Victoria has no such requirement and therefore, a class action may be commenced there regardless of when the cause of action arose.<sup>50</sup> In relation to the time limitation in Federal Court class actions, it must be remembered that, since damage is an essential element of liability, no cause of action accrues until damage has occurred.<sup>51</sup> In the product liability context, a product may be sold by a manufacturer but not fail or otherwise injure the claimant until well after the sale. Accordingly, in circumstances where damage is not suffered until some time after the other elements of the cause of action have arisen, the circumstances giving rise to the cause of action may well provide the

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46. See, e.g., *In re N. D. Cal. Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847, 856 (9th Cir. 1982).

47. See A.L.R.C. Report, *supra* note 17, at ¶ 63 (1989). The A.L.R.C. decided to allow such class actions based on submissions made by plaintiffs' lawyers, such as Dr. Peter Cashman, that it was unfair that litigation such as the Dalkon Shield proceedings not be allowed to proceed as grouped proceedings. Due to the unavailability of class actions in New South Wales, this litigation was run as a more traditional "test case" style quasi-class action.

48. See Federal Court of Australia Act, 1976, § 33C(1) (Austl.); see also Supreme Court Act, 1986, § 33C(1) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.03(1) (Vict.).

49. See Federal Court of Australia Act, 1976, § 33B (Austl.).

50. See Supreme Court Act, 1986, § 33B(1) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.02(1) (Vict.).

51. See JOHN G. FLEMING, *THE LAW OF TORTS* 217 (9th ed. 1998).

basis of a class action, even though the product was supplied prior to March 4, 1992.

2. *The Class.* As a general rule, the consent of a person to be a class member is not required.<sup>52</sup> However, a member may opt out of the class action by written notice within a period specified by the court.<sup>53</sup> While a plaintiff is obliged to describe the class, there is no obligation to identify, name, or even specify the number of the class members.<sup>54</sup> The court may, at any stage in the proceedings, grant leave to amend the pleadings to alter the description of the class.<sup>55</sup> Such an amendment may even include additional class members who did not have a cause of action at the time the proceedings were commenced.<sup>56</sup>

3. *Opt-out Procedure.* Once proceedings have commenced, the court will fix a date by which a class member may opt out of the proceedings.<sup>57</sup> Members opt out by giving written notice to the court.<sup>58</sup> The court will also give directions regarding the manner in which class members are to be notified of the fact that the proceedings have been commenced and the procedure that must be followed in the event that they wish to opt out of those proceedings.<sup>59</sup>

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52. See Federal Court of Australia Act, 1976, § 33E(1) (Austl.); see also Supreme Court Act, 1986, § 33E(1) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.05(1) (Vict.).

53. See Federal Court of Australia Act, 1976, § 33J (Austl.); see also Supreme Court Act, 1986, § 33J (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.09 (Vict.).

54. See Federal Court of Australia Act, 1976, § 33H (Austl.); see also Supreme Court Act, 1986, § 33H (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.07 (Vict.).

55. See Federal Court of Australia Act, 1976, § 33K(1) (Austl.); see also Supreme Court Act, 1986, § 33K(1) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.10(1) (Vict.).

56. See Federal Court of Australia Act, 1976, § 33K(2) (Austl.); see also Supreme Court Act, 1986, § 33K(2) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.10(2) (Vict.).

57. See Federal Court of Australia Act, 1976, § 33J(1) (Austl.); see also Supreme Court Act, 1986, § 33J(1) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.09(1) (Vict.).

58. See Federal Court of Australia Act, 1976, § 33J(2) (Austl.); see also Supreme Court Act, 1986, § 33J(2) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.09(2) (Vict.).

59. See Federal Court of Australia Act, 1976, § 33Y (Austl.); see also Supreme Court Act, 1986, § 33Y (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.23 (Vict.).

The form of notice is at the discretion of the court and, for example, may be given by way of advertisements in newspapers or broadcast on radio or television.<sup>60</sup> Recently, the Federal Court decided to establish a web site to inform putative class members in the \$750 million class action against the GIO of the details of the claim by providing access to the current pleadings.<sup>61</sup> The notice, which summarizes the claims made by the representative plaintiff, will be mailed to putative class members.<sup>62</sup> However, the court was of the opinion that the putative class members should also have access to the pleadings via the internet to enable them to determine whether they are in fact members.<sup>63</sup> The court decided to establish the web site as an alternative to the plaintiff's suggestion of using the web site maintained by his lawyers (the court considered the latter to be problematic because the lawyers' web site contained promotional material).<sup>64</sup> While the rules leave open the question of who should pay for these advertisements, it has been the plaintiffs who have had to meet the initial costs to date.

Unless a person actually takes the step of opting out in writing, he or she will continue to be part of the action and be bound by its outcome.<sup>65</sup> Of course, there remains a real possibility that a person who is deemed to be a class member by virtue of the class description may never actually become aware that proceedings have commenced and will nevertheless become bound by the result of those proceedings by default.

4. *Subgroups and Individual Class Members.* As mentioned earlier, provision is made in Australian class action procedure for the determination of specific issues in the proceedings relating to "subgroups" or even individuals.<sup>66</sup> Thus, the fact that the circumstances

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60. See Federal Court of Australia Act, 1976, § 33Y(4) (Austl.); see also Supreme Court Act, 1986, § 33Y(4) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.23(3) (Vict.).

61. See *King v. GIO Australia Holdings Ltd.* (2000) F.C.A. 1869 ¶¶ 20-22 (Austl.).

62. See *id.* ¶ 19.

63. See *id.* ¶ 22.

64. See *id.*

65. See Federal Court of Australia Act, 1976, § 33ZB(b) (Austl.); see also Supreme Court Act, 1986, § 33ZB (b) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.27(b) (Vict.).

66. See Federal Court of Australia Act, 1976, § 33Q-R (Austl.); see also Supreme Court Act, 1986, § 33Q-R (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.15-16 (Vict.).

giving rise to a class action can only be resolved at an individual level will not prevent the matter from proceeding as a class action.

5. *Judgment and Costs.* Judgment in a class action binds all persons who are members of the class—that is those persons who fall within the class description and have not opted out in writing—at the date judgment is given, regardless of whether or not they even knew of the proceedings.<sup>67</sup> Where the court finds in favor of the class, it may *inter alia* make an award of damages to class members, subgroup members or even individual members.<sup>68</sup> According to the circumstances, the court may award damages consisting of:

- specified amounts;
- amounts calculated in a particular manner; or
- an aggregate amount without specifying the amounts to be awarded with respect to individual class members.<sup>69</sup>

Where the last option is adopted, a mechanism is then established to determine the share of the aggregate amount to which each member is entitled.<sup>70</sup>

In Australia, the so-called “English Rule” applies in relation to the payment of the costs of legal proceedings, including class actions.<sup>71</sup> As a general rule, the successful party’s costs must be paid by the unsuccessful party. In this context, the term “costs” includes not only out-of-pocket expenses (called disbursements in Australia), but also attorney’s fees. However, in the case of class actions, the rules expressly prohibit a costs order being made against the class members other than the plaintiff(s) who actually commenced the proceedings.<sup>72</sup>

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67. See Federal Court of Australia Act, 1976, § 33ZB(b) (Austl.); see also Supreme Court Act, 1986, § 33ZB(b) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.27 (Vict.).

68. See Federal Court of Australia Act, 1976, § 33Z(1)(e) (Austl.); see also Supreme Court Act, 1986, § 33Z(1)(e) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.25(1)(e) (Vict.).

69. See Federal Court of Australia Act, 1976, § 33Z(1)(e)-(f) (Austl.); see also Supreme Court Act, 1986, § 33Z(1)(e)-(f) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.25(1)(e)-(f) (Vict.).

70. See Federal Court of Australia Act, 1976, § 33Z(2), (4) (Austl.); see also Supreme Court Act, 1986, § 33Z(2), (4) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.25(2), (4) (Vict.).

71. See ROGER QUICK, QUICK ON COSTS 9 (1996) (regarding the historical origins of the English Rule).

72. See Federal Court of Australia Act, 1976, § 43(1A) (Austl.); see also Supreme Court Act, 1986, § 33ZD(b) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.30 (Vict.). There is currently no provision for members of an unsuccessful class to be or-

A costs order may also be made in favor of those individuals who commence proceedings where the action is successful or where the court otherwise orders.<sup>73</sup>

Needless to say, plaintiffs' lawyers are often careful to nominate as the representative party a person of straw—that is to say, someone who has no assets and who is therefore incapable of satisfying any significant order for costs made in favor of the defendant. Defendants have responded to this tactic by seeking what is known as an order for security for costs against the plaintiff. This is an order that can be made by the court requiring a plaintiff to pay into court, or otherwise give security for, an amount equal to the estimated costs of the proceedings—including attorney's fees. Initially, the courts were reluctant to make such orders in the context of a class action.<sup>74</sup> However, an order for security for costs was recently made against an incorporated organization that was specifically established to commence a class action against the tobacco industry.<sup>75</sup>

More recently, defendants have sought orders for costs against plaintiffs' lawyers in circumstances where it has been asserted that the class action commenced had no prospect of success. While the suggestion of such an application has in the past been the subject of some adverse comment, the Federal Court recently ordered a firm of plaintiffs' lawyers to pay the defendant's costs on an indemnity basis, for the reason that the firm gave no consideration, or no proper consideration, to the question whether the federal claim had any prospect of success.<sup>76</sup> This decision constitutes a clear warning that those advising plaintiffs should not commence class actions hastily or without full and proper consideration.

6. *Termination of a Class Action.* Once a class action has been commenced, the court has the power to order, in certain circumstances and on application by the defendant or by its own motion, the

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dered to contribute to costs, even where the plaintiff has insufficient finances to satisfy any costs order.

73. See Federal Court of Australia Act, 1976, § 33ZJ (Austl.); see also Supreme Court Act, 1986, § 33ZJ (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.29 (Vict.).

74. See, e.g., *Ryan v. Great Lakes Council* (1998) 154 A.L.R. 584 (Austl.) (Wilcox, J.).

75. See *Tobacco Control Coalition Inc. v. Philip Morris (Austl.) Ltd.* (2000) F.C.A. 1404 (Austl.).

76. See *Cook v. Pasminco Ltd. II* (2000) F.C.A. 1819 (Austl.).

discontinuance of the proceedings as a class action.<sup>77</sup> Such an order might be made where the cost of the proceedings would be excessive, having regard to the costs which would be incurred if each group member conducted a separate proceeding.<sup>78</sup> Similarly, the courts have the power to order the discontinuance of the proceedings where the class action mechanism would not provide an efficient and effective means of dealing with the claims of group members or it is otherwise inappropriate for the proceedings to continue in a representative form.<sup>79</sup> The court may also order the stay of proceedings where no reasonable cause of action is disclosed or where the proceedings are oppressive, frivolous, or otherwise an abuse of process.<sup>80</sup>

The fact that the courts have such extensive powers to terminate or stay a class action has been relied upon to justify a number of key aspects of Australian class action procedure. First, as has already been noted, these powers have been seen as a substitute for U.S.-style certification.<sup>81</sup> Second, they have been relied upon by the High Court to act as a counterpoise to that Court's liberal construction of the requirement that there be a substantial common issue.<sup>82</sup> Third, they have been deployed in answer to critics of the class action procedure who argue that it only serves to encourage speculative, lawyer-driven litigation, the cost of which is ultimately borne by the public at large. At the same time, those acting for plaintiffs have criticized the fact that defendants have been quick to bring motions seeking to terminate or strike out class action claims.<sup>83</sup> Of course, their objections may well be motivated by the general success of these applications.

The extent to which the courts will be prepared to exercise the power to terminate class actions has yet to be determined. In the early cases, there was a degree of reluctance on the part of the courts

77. See Federal Court of Australia Act, 1976, § 33N(1) (Austl.); see also Supreme Court Act, 1986, § 33N(1) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.13(1) (Vict.).

78. See Federal Court of Australia Act, 1976, § 33N(1)(a) (Austl.); see also Supreme Court Act, 1986, § 33N(1)(a) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.13(1)(a) (Vict.).

79. See Federal Court of Australia Act, 1976, § 33N(1)(c), (d) (Austl.); see also Supreme Court Act, 1986, § 33N(1)(c), (d) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.13(1)(c), (d) (Vict.).

80. See Federal Court of Australia Act, 1976, § 33ZG(b) (Austl.).

81. See *supra* notes 39-40 and accompanying text.

82. See *Wong v. Silkfield Pty. Ltd.* (1999) 199 C.L.R. 255 (Austl.) at ¶ 29; *infra* discussion Section IV.B.4.

83. See, e.g., Nicholas Reece, *Defence Tactics Lack Class, Says Lawyer*, AUSTL. FIN. REV., Apr. 28, 2000, at 29.

to exercise the power in favor of defendants.<sup>84</sup> Some courts appeared to adopt this approach on the basis that use of the new procedure should be encouraged and that they should, wherever possible, accommodate the plaintiff's wish to have an action proceed as a class action.<sup>85</sup> More recently, however, there has been a hardening of attitude. In part this probably reflects a growing realization on the part of the courts that some of the proceedings commenced as class actions would simply overwhelm the court system if allowed to proceed. This harder line is reflected in the comments of the High Court that, if it becomes evident that a class action is not the preferable means of dealing efficiently with a case, the court should, in its discretion, terminate the representative nature of the action.<sup>86</sup>

7. *Settlement or Discontinuance of a Class Action.* A class action may not be settled or discontinued without the approval of the court. A court may make any orders that it thinks are just in relation to the distribution of the money paid under the settlement or paid into court.<sup>87</sup> A court cannot approve a settlement until notice has been given to class members.<sup>88</sup>

An interesting issue arises where some class members do not show a willingness to participate in settlement, but have not opted out by the time the rest of the class has agreed to specific terms of settlement.<sup>89</sup> This raises a question as to whether these so-called "free-loaders" can be excluded from any settlement that is approved. The question was recently considered by the Federal Court in *Wong & Ors v. Silkfield Pty. Ltd.*<sup>90</sup> In that case, class members were given notice of proposed terms of settlement and an opportunity to agree to,

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84. See *Tropical Shine Holdings Pty Ltd. v. Lake Gesture Pty. Ltd. & Ors* (1993) 45 F.C.R. 457 (Austl.).

85. See *id.* at 462.

86. See *Wong v. Silkfield Pty. Ltd.* (1999) 199 C.L.R. 255 (Austl.), at ¶ 33 (approving the approach of the trial judge).

87. See Federal Court of Australia Act, 1976, § 33V (Austl.); see also Supreme Court Act, 1986, § 33V (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.20 (Vict.). Similarly, the person or persons who actually commenced the action may only withdraw from the proceedings or settle their individual claims with the leave of the Court. See Federal Court of Australia Act, 1976, § 33W(1) (Austl.); see also Supreme Court Act, 1986, § 33W(1) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.21(1) (Vict.).

88. See Federal Court of Australia Act, 1976, § 33X(4) (Austl.); see also Supreme Court Act, 1986, § 33X(4) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.22(4) (Vict.).

89. See *Wong v. Silkfield Pty. Ltd.* (2000) F.C.A. 1421 (Austl.).

90. See *id.*



or dispute the reasonableness of, the proposed terms.<sup>91</sup> Some of the class had reached what the Court found to be an informed settlement agreement with the defendants.<sup>92</sup> The remaining members did not give instructions to settle, nor did they commence their own proceedings.<sup>93</sup>

The Court held that it was fair and reasonable to exclude the members who had not expressed any willingness to settle and who had not contributed to or been involved in settlement negotiations.<sup>94</sup> Indeed, the Court referred to one such member as a “parasitical freeloader who is not prepared to do anything in his own self-interest that may have a cost to him.”<sup>95</sup> Two other members had expressed their wish to have a settlement different from that proposed, but without any personal involvement by way of submission and (inferentially) by way of cost. The Court held that it was also fair to exclude them from the approved settlement scheme on the basis that they “want[ed] to have some of the cake without contributing in any way to the preparation of it.”<sup>96</sup>

The Court in *Wong* also set out some of the factors that the Court should take into account when deciding whether or not to approve a proposed settlement.<sup>97</sup> These include the likely cost and duration of the proceedings if approval is not given, the sum offered, and the likelihood of success in the proceedings.<sup>98</sup>

#### IV. AUSTRALIAN CLASS ACTIONS IN PRACTICE

This Section first explores the practical differences between class actions brought in the Federal Court as opposed to the Supreme Court of Victoria. It then discusses the way in which Australian courts have interpreted the provisions of the class action procedures.

##### A. Differences Between Federal Court and Supreme Court of Victoria Class Actions

While the rules with respect to class actions are essentially the same in the Federal Court and the Supreme Court of Victoria, there

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91. *See id.*

92. *See id.*

93. *See id.*

94. *See id.* ¶ 24 (Spender, J.).

95. *Id.*

96. *Id.* ¶ 30 (Spender, J.).

97. *See id.* ¶ 18 (Spender, J.).

98. *See id.*

are two important differences in practice between class actions brought in these Courts. First, the Federal Court is a court of limited jurisdiction in the sense that it is restricted to the determination of proceedings involving matters of federal law. This is a consequence of a recent decision of the High Court, which held that state jurisdiction cannot be vested in federal courts—this means that the Federal Court cannot determine a matter involving *only* state law; there must be a federal element.<sup>99</sup> The jurisdiction of the Federal Court with respect to a “matter” authorizes the Court to determine all the claims, federal and non-federal, which are involved in the controversy. If a matter is brought before the Federal Court but the federal claim is unsuccessful or struck out, this does not necessarily deprive the Court of jurisdiction to deal with the non-federal claims.<sup>100</sup>

In any event, much of Australia’s product liability, corporations, and consumer protection law is governed by federal statutes.<sup>101</sup> As a consequence, it is possible to commence a class action in the Federal Court under an extraordinarily broad range of claims, save for those in which the sole cause of action is founded in common law negligence or contract. In practice, this is rare as most plaintiffs can find a cause of action grounded in federal law to plead in the alternative and thus gain access to the Federal Court. Still, the establishment of the Supreme Court of Victoria class action procedure has, at least theoretically, expanded the types of class actions which may be brought in Australia.

A second difference, as mentioned in Section II, is that there is no real possibility of a jury trial in the Federal Court; while the Federal Court Act allows parties to apply to the Court for a jury trial, all

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99. *See* *Re Wakim; Ex parte McNally* (1999) 198 C.L.R. 511 (Austl.). As to the jurisdiction of the Federal Court, see Part III of the Federal Court of Australia Act, 1976, § 19 (Austl.) which provides that the Federal Court has such original jurisdiction as is vested in it by laws made by Federal Parliament.

100. An example of this is the class action involving the explosion in 1998 which resulted in a disruption of gas supply in the State of Victoria. The Full Federal Court recently struck out the federal claim but held that there was sufficient overlap in the factual issues raised by the federal (trade practices) claim and the non-federal (negligence) claim for it to be said that the negligence claim formed part of the same “matter” and was thus within the accrued jurisdiction of the Federal Court. *See Johnson Tiles Pty. Ltd. v. Ezzo (Austl.) Ltd.* (2000) F.C.A. 1572 (Austl.). On February 16, 2001, the High Court granted leave to appeal the decision of the full Federal Court. The date for the hearing of the High Court appeal is yet to be determined.

101. *See, e.g.,* The Corporations Law (Austl.) (corporations); Trade Practices Act, 1974, Part VA (Austl.) (consumer protection and product liability); Schwartz & Behrens, *supra* note 38 (product liability).

such applications to date have failed.<sup>102</sup> Thus, a class action commenced in the Federal Court will be heard and determined by a judge alone. However, juries are not uncommon in the Supreme Court of Victoria. Indeed, in the context of Australia, more civil jury trials take place in Victoria than anywhere else in the country.<sup>103</sup> Given the media interest in class actions, this has the potential to be considerably significant. It also raises the prospect of significant awards of damages, particularly in circumstances—for example, in relation to a common law negligence claim—where there is a claim for punitive or exemplary damages.<sup>104</sup>

## B. Judicial Interpretation of the Class Action Provisions

1. *Threshold Tests.* The three threshold tests which must be satisfied before a class action can be commenced in Australia<sup>105</sup> have been the subject of much recent judicial consideration as to their application. This is usually in the context of strike-out applications brought by defendants in which it is argued that the proceedings are not properly brought as class actions because one or more of the threshold tests have not been met.<sup>106</sup> The threshold requirements have been liberally interpreted by the courts such that they are easily satisfied in practice.<sup>107</sup>

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102. See Federal Court of Australia Act, 1976, § 39 (Austl.) (“In every suit in the Court, unless the Court or a Judge otherwise orders, the trial shall be by a Judge without a jury.”). The Federal Court may direct trial by jury “in any suit in which the ends of justice appear to render it expedient to do so.” *Id.*, § 40. The A.L.R.C. concluded that there is no inherent difference between representative and individual proceedings which justifies depriving the Federal Court of its existing discretion to order trial by jury in appropriate cases; but that, in practice, it is most unlikely that this discretion will be exercised to order a jury trial in representative proceedings. See A.L.R.C. Report, *supra* note 17, ¶ 207.

103. For example, from March 1999 until February 2000, there were ten civil jury trials on foot in the Victorian Supreme Court; eight trials eventually settled, and verdicts were entered in two. While these figures are low by American standards, they are relatively high for Australian jurisdictions.

104. The courts have held that punitive or exemplary damages cannot be awarded in relation to causes of action arising out of breaches of the provisions of the Trade Practices Act. See Trade Practices Act, 1974, Part VA (Austl.). See, e.g., *Nixon v. Philip Morris (Austl.) Ltd.* (1999) 95 F.C.R. 453 (Austl.).

105. See Federal Court of Australia Act, 1976, § 33C(1) (Austl.); see also Supreme Court Act, 1986, § 33C(1) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.3(1) (Vict.); discussion *supra* Section III.D.

106. See Federal Court of Australia Act, 1976, § 33N(1) (Austl.); see also Supreme Court Act, 1986, § 33N(1) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.13(1) (Vict.); discussion *supra* Section III.D.6.

107. See discussion *infra* Section IV.B.2-B.4.

2. *At Least Seven Class Members.* In addition to the requirement that there be at least seven class members, the courts have held that it is not sufficient that one member has a claim against one defendant while other class members have claims against other defendants: to qualify as a class action, *all* class members must have a claim against *all* defendants.<sup>108</sup>

In *Symington & Anor v. Hoechst Schering Agrevo & Ors*, an action was commenced in the Federal Court by plaintiffs on behalf of themselves and other persons who allegedly suffered losses following their detection of an agricultural chemical in beef and beef cattle.<sup>109</sup> The plaintiffs claimed that they themselves did not use the chemical, but rather that the chemical was sprayed from airplanes on the cotton fields which adjoined their properties.<sup>110</sup> In this case, it was not clear that seven or more persons had a claim against any particular defendant.<sup>111</sup> There was some difficulty in establishing which of the several manufacturers or distributors of the chemical supplied the product that caused contamination of particular cattle.<sup>112</sup> The Court dismissed the action against the all of the defendants whom the plaintiffs had no personal claim.<sup>113</sup> However, the Court also granted the plaintiffs additional time to complete investigations concerning the source of the chemical.<sup>114</sup>

In *Ryan v. Great Lakes Council & Ors*, the plaintiff sued on behalf of himself and all other persons who suffered injury as a result of eating oysters contaminated with the Hepatitis A virus from the Wallis Lakes region in New South Wales.<sup>115</sup> Again, the Federal Court held that the plaintiff must have a personal claim against each defendant that is shared by at least six other persons.<sup>116</sup> In its decision, the Court held that the legislation does not prevent several defendants being joined in a single class action, so long as the commencement and standing requirements are met by the plaintiff with respect to each of them.<sup>117</sup>

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108. See, e.g., *Philip Morris (Austl.) Ltd. v. Nixon* (2000) 170 A.L.R. 487 (Austl.) ¶ 155; see also A.L.R.C. Report, *supra* note 17, ¶¶ 69, 95, 133.

109. (1997) 149 A.L.R. 261 (Austl.).

110. See *id.*

111. See *id.*

112. See *id.*

113. See *id.* at 265 (Wilcox, J.).

114. See *id.* at 264.

115. (1997) 78 F.C.R. 309 (Austl.).

116. See *id.* at 312 (Wilcox, J.).

117. See *id.*

The requirement that each represented person have a claim against each defendant has recently been reaffirmed by the full Federal Court.<sup>118</sup> That Court held that just because a person is ultimately adjudged to be entitled to succeed against only one defendant does not mean that the person makes a claim against only that defendant.<sup>119</sup> The first threshold test will be satisfied so long as each class member *makes a claim* against each defendant.<sup>120</sup> It matters not whether each member is ultimately successful in its claims against each defendant.<sup>121</sup>

3. *Same, Similar, or Related Circumstances.* This requirement is obviously met in cases where a single act or omission by the defendant allegedly causes injury to the class members. An example of such a situation is an airplane crash. However, the requirement has been interpreted to include situations which involve the claims of persons separated in terms of time, place, and individual circumstance.

In *Zhang v. Minister for Immigration, Local Government and Ethnic Affairs*, the Federal Court held that:

Each claim is based on a set of facts which may include acts, omissions, contracts, transactions and other events. As appears from § 33C(2) [of the Federal Court Act] the circumstances giving rise to claims by potential group members do not fall outside the scope of the legislation simply because they involve separate contracts or transactions between individual group members and the respondent or involve separate acts or omissions of the respondent done or omitted to be done in relation to individual group members.<sup>122</sup>

The Court considered that the outer limits of eligibility for participation in class actions are defined by reference to claims with respect to or arising out of related circumstances, and that the word “related” suggests a connection wider than identity or similarity.<sup>123</sup> In each case, a threshold judgment must be made as to whether the similarities or relationships between circumstances giving rise to each claim are sufficient to merit their grouping as a class action.<sup>124</sup> The Court proposed that, at the margins, these will be practical judgments informed by the policy and purpose of the legislation.<sup>125</sup> Further, the Court held that

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118. See *King v. GIO Austl. Holdings Ltd.* (2000) F.C.A. 1543 (Austl.); see also *King v. GIO Austl. Holdings Ltd.* (2000) F.C.A. 617 (Austl.), ¶ 29.

119. See *King v. GIO Austl. Holdings Ltd.* (2000) F.C.A. 1543 (Austl.) ¶ 7.

120. See *id.*

121. See *id.*

122. (1993) 45 F.C.R. 384, 404 (Austl.) (French, J.).

123. See *id.* at 405.

124. See *id.*

125. See *id.*

at some point along the spectrum of possible classes of claims, the relationship between the circumstances of each claim will be incapable of definition at a sufficient level of particularity, or too tenuous or remote to attract the application of the legislation.<sup>126</sup>

In *Tropical Shine Holdings Pty. Ltd. v. Lake Gesture Pty. Ltd. & Ors*,<sup>127</sup> the Federal Court held that the description of the class satisfied the threshold requirements because:

Although the claims differ, the applicant's personal claim is not incompatible with the [class] members' claim. On the contrary, it is an essential ingredient of the applicant's personal claim that people were misled by the advertisements into purchasing furniture from [its competitor]. The cases divide only after that fact is established.<sup>128</sup>

In *Wong & Ors v. Silkfield Pty. Ltd.*, Judge Spender, sitting in the Federal Court (at first instance), acknowledged that in that case there were non-common issues involved in the various individual complaints and that in each individual case, there was the question of reliance which was a matter confined to the individual class member.<sup>129</sup> His Honor also acknowledged the further contentious question, namely, whether the "material prejudice" referred to in the relevant Act required an examination of the subjective circumstances of the purchaser or whether it could be objectively determined.<sup>130</sup> Despite these issues, Judge Spender held that the claims of the proposed class members in those proceedings satisfied the requirements of same, similar, or related circumstances: the claims were all based on the representations made concerning resale of land, at a profit, before settlement, performance, projections, any inquiry into whether the requirements of the relevant Act had been complied with, and the associated question of whether the representations made were accurate.<sup>131</sup>

On appeal, a majority of the Full Federal Court in *Silkfield Pty. Ltd. v. Wong* disagreed with Judge Spender's conclusion.<sup>132</sup> In considering the second and third threshold requirements, the Court held that only one issue in that action, concerning the accuracy of a

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126. *See id.*

127. *See* (1993) 45 F.C.R. 457 (Austl.).

128. *Id.* at 464 (Wilcox, J.).

129. *See* (1998) A.T.P.R. ¶ 41-613 (Austl.).

130. *See id.* ¶ 40,725.

131. *See id.*

132. *See Silkfield Pty. Ltd. v. Wong* (1998) 90 F.C.R. 152 (Austl.).

pleaded representation, was a common issue.<sup>133</sup> From that, it could not be concluded that the resolution of this issue would be likely to wholly or substantially resolve the claims of individuals, particularly their entitlement to damages.<sup>134</sup> The appeal was allowed and the proceedings remitted for determinations of the plaintiffs' claims individually.<sup>135</sup>

However, in *Wong v. Silkfield Pty. Ltd.*, the High Court overturned the decision of the Full Federal Court and effectively agreed with the reasoning of the trial judge.<sup>136</sup> Consequently, it will now be sufficient if the claims of the members of the class arise out of the same or similar circumstances, there being no additional requirement that it be a central or substantial issue.<sup>137</sup> This case is considered further below.

4. *Substantial Common Issue of Law or Fact.* This requirement has proven to be the most controversial. In *Silkfield Pty. Ltd. v. Wong*, a majority of the Full Federal Court stated that

Section 33C(1)(c) [of the Federal Court Act] does not permit an action to be commenced under Pt IVA merely because there is an issue of fact or law common to the claims of all group members: the common issue must have the additional quality of being a 'substantial' common issue. . . . [The common issue must be] an issue with some special significance for the resolution of the claims of all the group members . . . [or be] likely to have a major impact on the conduct and outcome of the litigation.<sup>138</sup>

On that basis, the Court indicated that

The kind of case that can best be run as a representative proceeding is one arising out of a "mass wrong," i.e., out of a single act, omission or course of conduct or the same act, omission or course of conduct repeatedly made or engaged in, and thus a case in which one or a handful of representative parties are able themselves to give the evidence necessary to present a large part of the case for all group members.<sup>139</sup>

On appeal in *Wong v. Silkfield Pty. Ltd.*, the High Court considered Part IVA of the Federal Court Act in the context of the regimes for representative actions which had preceded it, as discussed in Sec-

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133. See *id.* at 171 (O'Loughlin & Drummond, JJ.).

134. See *id.*

135. See *id.* at 172.

136. See *Wong v. Silkfield Pty. Ltd.* (1999) 199 C.L.R. 255 (Austl.).

137. See *id.* ¶ 28.

138. *Silkfield Pty. Ltd. v. Wong* (1998) 90 F.C.R. 152 (Austl.), at 166, 167.

139. *Id.* at 171.

tion III of this Article. The High Court held that the purpose of the enactment of Part IVA, in that context, was clearly not to narrow access to the new form of representative proceedings beyond that which applied under the existing regimes.<sup>140</sup> Consequently, the Court concluded that

“substantial” does not indicate that which is “large” or “of special significance” or would “have a major impact on the . . . litigation” but, rather, is directed to issues which are “real or of substance.”<sup>141</sup>

Whether the requisite degree of commonality of issues of law or fact is achieved will depend upon the circumstances of each individual case. However, the High Court’s decision in *Wong v. Silkfield Pty. Ltd.* means that a reasonably liberal approach will now be adopted by Australian courts. That is, the test of substantiality is a wide one, which merely requires that the common issue not be trivial or colorable in the sense of being superficial. It need not, however, be a central or major issue.<sup>142</sup>

5. *An Escape Hatch.* Importantly, however, the High Court held in *Wong v. Silkfield Pty. Ltd.* that a class action which passes the threshold tests may later be terminated as a class action,<sup>143</sup> by order made under Section 33N of the Federal Court Act.<sup>144</sup> The High Court quoted with approval Judge Spender’s judgment at first instance:

There will always be a large degree of evaluation concerning commonality and non-commonality of issues and ultimately, if because of the extent of non-common issues, representative proceedings in the assessment of the court are not the preferable means of dealing efficiently and effectively with the claims, the court will no doubt terminate the representative nature of the proceedings in the exercise of the discretion conferred by section 33N(1)(d) of the [Federal Court of Australia] Act.<sup>145</sup>

The High Court distinguished Sections 33C and 33N in terms of the *stage of litigation* at which the provisions come into play.<sup>146</sup> Their Honors found that Section 33C is only relevant at the commencement of a class action, whereas a Section 33N application should only be

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140. See *Wong v. Silkfield Pty. Ltd.* (1999) 199 C.L.R. 255 (Austl.), ¶ 28.

141. *Id.*

142. See also *King v. GIO Austl. Holdings Ltd.* (2000) 100 F.C.R. 209, ¶¶ 47, 51.

143. See (1999) 199 C.L.R. 255, ¶ 33.

144. Indeed, the Court found that this confirmed their liberal construction of substantiality. Cf. Supreme Court Act, 1986, § 33N (Vict.); Supreme Court (General Civil Procedure) Rules, 1996, Or. 18A.13(1) (Vict.). See discussion *supra* Section III.D.6.

145. *Wong v. Silkfield Pty. Ltd.* [1998] A.T.P.R. ¶ 41-613, at 40,726 (Austl.).

146. See *Wong v. Silkfield Pty. Ltd.* (1999) 199 C.L.R. 255 (Austl.), ¶ 26.



made at a later stage, preferably after pleadings have closed.<sup>147</sup> In *Wong v. Silkfield Pty. Ltd.*, it was too early to determine an application pursuant to Section 33N.

It therefore appears that, even where the threshold tests are satisfied at the commencement of a class action, Australian courts will be willing to entertain a Section 33N strike-out application later in the proceedings. In this sense, after the issues in dispute have been properly clarified, Section 33N provides courts with an “escape hatch” through which the issues may pass in order to terminate inappropriate class actions.

6. *Specificity of Pleadings.* Another method which has been used to strike out class actions is the careful curial analysis of the pleadings. Australia has a system of fact pleading which is stricter than the system of issues or notice pleading used in the United States. The principal rule of pleading in Australia is that the “material facts” must be pleaded.<sup>148</sup> Once an issue is joined in the pleadings, the court and the parties are confined to the facts contained therein. At the end of a case, if the pleadings do not conform with the evidence, the case will be lost. While the rules provide for the amendment of pleadings at any time after they are filed, this will not be allowed if prejudice will be suffered by the opponent as a result of such amendment.

The courts have held that the normal pleading rules apply to class actions as they do to any other action before the court.<sup>149</sup> Consequently, the initiating process must set out the material facts which the plaintiff alleges give rise to the cause or causes of action on which the plaintiff *and class members* rely, together with the particulars of the nature and extent of the their injuries or other loss.

At the same time, the courts have held that it may be sufficient for the plaintiff to plead the case of each class member at a “reasonably high level of generality.”<sup>150</sup> That is, the plaintiff is not necessarily bound to plead material facts specific to each class member. Rather, the plaintiff must furnish a statement of the case sufficient to allow

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147. See *id.*; see also *King v. GIO Austl. Holdings Ltd.* (2000) 100 F.C.R. 209, ¶ 52.

148. See F.C.R., Or. 11.2 (“A pleading of a party shall contain, and contain only, a statement in a summary form of the material facts on which he relies, but not the evidence by which those facts are to be proved.”); see, e.g., Supreme Court Rules Pt. 15 R.7(1) (N.S.W.).

149. See, e.g., *Philip Morris (Austl.) Ltd. v. Nixon* (2000) 170 A.L.R. 487 (Austl.), ¶ 129; *Harrison v. Lidiform Pty. Ltd.* [1998] F.C.A. 1487 (Austl.).

150. *Philip Morris v. Nixon* (2000) 170 A.L.R. 487 (Austl.), ¶ 133.

the defendant a fair opportunity to meet it.<sup>151</sup> The courts' allowance of a high degree of generality in pleading the claims of class members obviously makes it harder for defendants to understand the case against them.

While the class action procedures do not have special pleadings rules, they require that the initiating process describe or otherwise identify the class members to whom the proceeding relates, specify the nature of the claims made on behalf of the class members and the relief claimed, and specify the question(s) of law or fact common to the claims of the class members.<sup>152</sup> However, in describing class, it is not necessary to name or to specify the number of the members.<sup>153</sup>

Given these requirements, the pleadings will be examined closely by the courts to ensure that the action is adequately pleaded and should properly continue in representative form. The requirement that the representative party plead the claims of the represented persons is easy to achieve in a single-event class action, such as an airplane crash or food poisoning, but is much more difficult where there are numerous individual issues in dispute, such as in drug and medical device litigation.

Consequently, in several recent class actions, defendants in the Federal Court have brought applications to strike out pleadings on the basis, shortly put, that:

- The pleading does not relate to any particular class member but, rather, is a smorgasbord of all of the possible combinations and permutations of claims which may apply to any class member, but in fact apply to none; or
- The pleading particularizes the claim of the represented party alone and that person's claim is not representative of the class.

The argument has been that the pleading is defective both generally and insofar as the class action provisions are concerned.

For example, in *Harrison v. Lidofarm Pty. Ltd.*, the Federal Court struck out the relevant parts of the statement of claim as defective because they did not articulate the case of the various subgroups

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151. See *id.* ¶ 131.

152. See Federal Court of Australia Act, 1976, § 33H(1); see also Supreme Court Act, 1986, § 33H(2) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or.18A.07(2) (Vict.).

153. See Federal Court of Australia Act, 1976, § 33H(2); see also Supreme Court Act, 1986, § 33H(3) (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or.18A.07(3) (Vict.).

that the plaintiff claimed to represent.<sup>154</sup> In so doing, the Court held that

[a] representative party may be able to enforce the rights of others in a proceeding brought under Part IVA, but the statement of claim needs to identify what the rights of those represented are claimed to be, and how they are said to arise. . . . It is also necessary that class members know with some precision the nature of the case which the applicant seeks to bring on their behalf so that they can decide . . . whether to opt out of a claim formulated in that way. . . . In *Connell v. Nevada Financial Group Pty Ltd.* Drummond J. emphasized the importance of the pleadings in specifying precisely what representations were made to individuals within a class so that the Court can be satisfied that each class member truly does set up a representation to the same substance and effect. In *Cameron v. Qantas Airways Ltd.* Beaumont J. . . took the view, with which I respectfully agree, that it is not sufficient to plead the personal claim of the representative, without clearly articulating the basis of the claims of those whom the applicant purports to represent.<sup>155</sup>

The most recent and prominent example of a successful strike-out application by defendants on the basis of defective pleadings is the Australian tobacco class action, *Philip Morris (Australia) Ltd. & Ors v. Nixon & Ors.*<sup>156</sup> In *Nixon*, damages were sought on behalf of smokers who had contracted diseases that were allegedly smoking related. The smokers claimed that six cigarette corporations had engaged in misleading or deceptive conduct<sup>157</sup> in that their cigarettes were promoted as being healthy products, or at least healthier and safer than other corporations' cigarettes, that these corporations were negligent<sup>158</sup> in making such representations, and that, as a result of such conduct, the smokers were induced to begin or continue smoking the defendants' cigarettes.

The defendant corporations brought a motion, arguing *inter alia* that the proceedings were not properly constituted as a class action since it could not be shown that each smoker had smoked cigarettes manufactured or distributed by *all* of the corporations or had commenced or continued smoking as a result of the conduct of *all* of the corporations, as required by the rules.<sup>159</sup> The Full Federal Court

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154. See (1998) F.C.A. 1487 (Austl.).

155. *Id.* at 11-12 (citations omitted).

156. See (2000) 170 A.L.R. 487 (Austl.). On June 21, 2000, the High Court refused the plaintiffs leave to appeal the decision of the Full Federal Court.

157. See Trade Practices Act, 1974, §52 (Austl.) (prohibiting misleading or deceptive advertising).

158. That is, in breach of their common law duty of care.

159. See *Nixon*, 170 A.L.R. 487 (Austl.).

unanimously upheld the defendants' motion.<sup>160</sup> The Court held that the pleadings did not allege facts that would have established that each class member had a claim against each defendant.<sup>161</sup> Therefore, even if the alleged facts were proven, it could not be said that every class member suffered loss or damage as a result of the misleading or deceptive conduct, or negligence, of every defendant. The claims were of disparate instances of deception caused by different statements made by the defendant corporations, and which were therefore not properly described as being against all defendants or as arising out of the same, similar, or related circumstances (the claims could not be regarded as even being related since the conduct alleged was diverse and spanned a period of some forty years).<sup>162</sup> Indeed, the Court further stated that, leaving the question of substantiality to one side, it was doubtful whether there were actually *any* questions of law or fact common to all of the class members' claims.<sup>163</sup>

The fact that there had been multiple unsuccessful attempts by the class members to plead their claims so as to comply with the requirements for the bringing of a class action was a further indication that the proceedings were not properly brought as a class action.<sup>164</sup> One of the judges stated that it was not in the interests of justice—indeed it was actually productive of injustice to the defendants—to permit the proceedings to continue as a class action.<sup>165</sup> The situation may have been different had the smokers claimed that the corporations had *collectively* embarked on a campaign designed to create a false community perception about the health risks associated with smoking.

Two of the three judges in that case refused the plaintiffs leave to replead on the basis that no matter what amendments were made to the pleadings, the action could not properly be brought as a class action.<sup>166</sup> Accordingly, it can be seen that, although defects in pleadings

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160. *See id.* The bench was comprised of Judges Spender, Hill, and Sackville. Judge Sackville wrote the leading judgment with which the other judges agreed, except that the latter justices refused the plaintiffs leave to re-plead, while Judge Sackville granted such leave.

161. *See id.* ¶ 155 (Sackville, J.).

162. *See id.* ¶¶ 162-166 (Sackville, J.).

163. *See id.* ¶ 167 (Sackville, J.).

164. *See id.* ¶ 10 (Spender, J.), ¶ 16 (Hill, J.). There were six written versions of the initiating process, as well as oral changes to those pleadings, made during the course of proceedings before the primary judge.

165. *See id.* ¶ 20 (Hill, J.).

166. *See id.* ¶ 1 (Spender, J.), ¶ 15 (Hill, J.). Judge Sackville, however, found that the proceeding was not properly constituted as a representative proceeding *as then pleaded*, and so granted leave to re-plead. *See id.* ¶ 189.

might be cured by amendment, there is a substantive threshold, which must be crossed by the plaintiff and the represented persons before a class action can properly be brought. The message given in *Nixon* is that the inherently individual nature of the class members' claims may mean that proceedings are not properly constituted as a class action.

## V. A MODEL CLASS ACTION PROCEDURE?

The perception and understanding of most Australians, including many lawyers, of its class action procedure is based on American film and television. However, despite the apparent similarities, there are, in fact, many differences between Australian and American class actions.

Class actions were introduced into Australian law as part of a package of measures which were actually intended to increase the incidence of consumer and product liability litigation in Australia, as discussed in Section III of this Article. These changes, and particularly the introduction of a class action procedure, were heralded by those who act for plaintiffs as a significant victory for consumers. For its part, the business community saw the changes as the start of an inevitable slide into an abyss of U.S.-style litigation.

In fact, as is so often the case, the truth lies somewhere in between. It is undoubtedly true that the level of litigation in Australia has increased significantly. Plaintiffs' lawyers, while initially slow to recognize the class action mechanism, are now exploring the range of opportunities it presents. However, the results to date have been mixed. While plaintiffs have succeeded in a number of class actions, they are yet to win what might be described as a "blockbuster" judgment.

Class plaintiffs have fared reasonably well in Australia in cases where the injuries to class members all stem from a single cause at a distinct point in time (for example, food poisoning resulting from contaminated oysters).<sup>167</sup> This is because in such cases, issues relating to a defendant's liability do not differ significantly from one class member to the next.

Unlike an action arising out of a single accident or single course of conduct, however, product liability litigation (particularly drug and medical device litigation) often involves individual factual and legal issues. Such issues include differing models or types of products,

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167. See, e.g., *Graham Barclay Oysters Pty. Ltd. v. Ryan* (2000) A.T.P.R. (Digest) ¶ 46-207 (Austl.).

changes in design or formulation from year to year, varying representations by the manufacturer to the consumer, the intervention of a “learned intermediary” such as a physician,<sup>168</sup> variances in the law of product liability, and a wide array of affirmative defenses.<sup>169</sup> In particular, problems are created in that causation must be considered on a person-by-person basis, which is impractical and even impossible in proceedings conducted in the form of a class action. The best recent example of this is, of course, *Nixon*.<sup>170</sup>

This problem has often proved to be the reason why certification has been denied in the United States, and was well expressed by the court in *In re Northern District of California Dalkon Shield IUD Products Liability Litigation*:

In the typical mass tort situation, such as an airplane crash or a cruise ship food poisoning, proximate cause can be determined on a class-wide basis because the cause of the common disaster is the same for each of the plaintiffs. In product liability actions, however, individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of the risk, contributory negligence, and the statute of limitations) may depend on facts peculiar to each plaintiff's case.<sup>171</sup>

It is the Authors' opinion that such cases are never appropriate to proceed as class actions. Indeed, this is evidenced by the pleading

168. It has long been accepted in the United States that there is a special exception to the general rule that a product supplier's duty to warn of inherently dangerous characteristics is owed to the ultimate user of that product. The exception is that manufacturers of prescription drugs normally may discharge their duty to warn by giving adequate warnings to the medical profession who prescribe or administer the products to their patients. Thus the physician is said to be a learned intermediary—a professional who is best qualified to interpret the manufacturer's product instructions and warnings and to convey them to the patient or consumer. See N. Kathleen Strickland, *Current Applications and Limitations on the Learned Intermediary Rule*, 35(8) FOR THE DEFENSE 14 (1993). While not being labelled as such, the concept of the learned intermediary has recently been utilized in the Federal Court. See *Wilkins v. Dovuro Pty. Ltd.* (1999) 169 A.L.R. 276 (Austl.) ¶¶ 119-127. In that case, the supplier of canola seed to a seed distributor (intermediary) successfully defended a negligence claim brought by end-users of the seed on the basis that the distributor failed to conduct an intermediate inspection of the seed. See, e.g., David J. Kearney, *Learned Intermediary Defence—Alive and Well in Australia?*, 11(3) AUSTL. PROD. LIAB. REPORTER 33 (2000).

169. See *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1084-85 (6th Cir. 1996).

170. See *supra* note 156 and accompanying text.

171. *In re Northern District of California, Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847, 853 (9th Cir. 1982).

problems that are posed by having to arrive at a non-contentious class description and a properly particularized statement of claim.<sup>172</sup> It has certainly been the Australian experience that it is these claims which have the most tortuous interlocutory path and which have the greatest chance of being struck out or discontinued.

Consequently, in developing a new and more “ideal” class action procedure, it is submitted that the key is to minimize the extent to which the procedure is used to resolve cases that involve a multitude of individual issues and thereby raise difficult questions of causation. In this particular respect, the approach of American courts and legislation is to be preferred to that of Australia.

When the Federal Parliament introduced the law that established the first Australian class action procedure, it stated the objectives of the procedure as the following:

- Enhance access to justice, which is often denied by the high cost of litigation;
- Reduce the cost of proceedings, since groups are able to obtain cost-effective redress; and
- Promote efficiency in the use of the court’s resources.<sup>173</sup>

It is difficult to fault the logic behind the concept of class actions, given that they are a means of facilitating the administration of justice by enabling parties with the same or similar interests to secure a determination in one action rather than in separate actions. In theory, class actions should also benefit defendants by minimizing their risk of exposure to conflicting judgments in relation to different plaintiffs.

But this does not mean that *all* grouped individual claims should qualify as class actions. Unfortunately, there has been a trend for Australian plaintiffs’ lawyers to seek to widen the class of plaintiffs to the point of the ridiculous from an efficiency or fairness perspective. Indeed, the extremely (and deliberately) plaintiff-friendly nature of Australian class action procedure seems to encourage this.

The recent decisions of superior courts in Australia, however, are a sure sign that courts are taking on some of the responsibility for preventing the class action procedure from being abused in this way. The courts have come to recognize the extraordinary difficulties that will be created by allowing a case to proceed as a class action where there are a large number of class members, each of whom rely upon

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172. See Federal Court of Australia Act, 1976, § 33H; see also Supreme Court Act, 1986, § 33H (Vict.); cf. Supreme Court (General Civil Procedure) Rules, 1996, Or.18A.07 (Vict.).

173. See A.L.R.C. Report, *supra* note 17, ¶ 13.

disparate facts or whose individual claims can only finally be resolved by careful, individual analysis.

The courts' initial, somewhat *laissez faire*, approach which was marked by a reluctance to impose constraints upon the new rules has given way to a realization of the difficulties that would be created in allowing a mass of individual claims with limited common issues to proceed as a class action. Notwithstanding the plaintiff-friendly nature of the procedure and the fact that the threshold tests have been liberally interpreted, courts have done two things to prevent the inefficient or ineffective use of the class action mechanism. First, courts have marked the way to an escape hatch through the use of strike-out applications after the issues in dispute have been defined. Second, they have applied preexisting court rules to ensure that the claims of all represented persons are properly pleaded.

As yet, no class action involving a drug or medical device has proceeded to trial. A handful have been settled while others have been struck out or discontinued by the plaintiffs in the face of strident opposition from the defendants and a clear unwillingness on the part of the court to allow the matter to proceed.<sup>174</sup> Attempts to pursue tobacco class actions have met a similar fate.<sup>175</sup> While this new realization has been welcomed by defendants, the fact remains that the original authors of Australia's scheme effectively ensured that a range of cases which would never be allowed to proceed as class actions in the United States can proceed as such in Australia.

The real test will come over the next two or three years. There are a number of significant class actions proceeding through the interlocutory stages which will, seemingly, come to trial. In at least one of these actions, that arising out of the failure of Melbourne's gas supply, the Federal Court is faced with thousands of claims, the resolution of which require the determination of not just the quantum of each individual's loss, but also issues of causation, contractual liability, and reliance upon representations made by the various defendants.<sup>176</sup> How this will be achieved is yet to be seen.

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174. For example, in late 2000, the Fen-Phen class action was discontinued as a representative proceeding in the Federal Court and transferred as an individual proceeding to the Supreme Court of New South Wales. See *Crandell v Servier Laboratories (Austl.) Pty. Ltd.*

175. See *Philip Morris (Austl.) Ltd. v. Nixon* (2000) 170 A.L.R. 487; *supra* note 156 and accompanying text.

176. See *Johnson Tiles Pty. Ltd. v. Esso (Austl.) Ltd.* [2000] F.C.A. 1572 (Austl.). These proceedings have been afoot since late 1998 and the trial is awaiting the outcome of a High Court appeal in relation to whether the Federal Court has jurisdiction to hear the matter. See *supra* note 100.